

**No. 82-1243**

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**IN THE**

**Supreme Court of the United States**

**OCTOBER TERM, 1982**

**RICHARD D. BUNKER,**

*Appellant,*

**VS.**

**NATIONAL GYPSUM COMPANY,**

*Appellee.*

**On Appeal From The  
Supreme Court Of Indiana**

**MOTION TO DISMISS APPEAL  
Or In The Alternative  
TO AFFIRM JUDGMENT**

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**March 24, 1983**

## QUESTIONS PRESENTED

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Whether this appeal should be dismissed for failure to present a substantial Federal question in light of the fact that this Court has previously rejected similar due process and equal protection challenges to statutory limitations of actions?

Whether the decision of the Supreme Court of Indiana should be affirmed in light of the fact that it is consistent with prior decisions of this Court upholding statutory limitation of action provisions despite due process and equal protection challenges?

**PARTIES APPEARING**

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**RICHARD D. BUNKER**  
**Plaintiff-Appellant**

**NATIONAL GYPSUM COMPANY**  
**Defendant-Appellee**

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On Appeal From The  
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**MOTION TO DISMISS APPEAL  
Or In The Alternative  
TO AFFIRM JUDGMENT**

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Pursuant to Rule 16, paragraphs 1(b) and 1(c) of the Revised Rules of this Court, appellee moves that this appeal be dismissed or, alternatively, that the judgment of the Supreme Court of Indiana be affirmed.

**OPINIONS BELOW**

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*Bunker v. National Gypsum Company, .... Ind. ....*  
441 N.E.2d 8 (1982) (Appendix A, pages 1a-25a in  
Appellant's Jurisdictional Statement).

*Bunker v. National Gypsum Company*, ..... Ind. App. ...., 426 N.E.2d 442 (1981) (Appendix C, pages 27a-37a in Plaintiff's Jurisdictional Statement).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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This matter involves:

2) United States Constitution:

U.S. Const. amend. V;

U.S. Const. amend. XIV, § 1.

b) Indiana Constitution:

Ind. Const. art. I, § 12;

Ind. Const. art. I, § 23.

c) Statutes of the State of Indiana: 1937 Ind. Acts, Ch. 69, found within: Indiana Code § 22-3-7-1, *et seq.* (Burns 1974), specifically:

Ind. Code Section 22-3-7-9 (Burns 1974);

Ind. Code Section 22-3-7-32(c) (Burns 1974).

All pertinent parts are contained verbatim at Appendices H through J, pages 53a through 91a in Appellant's Jurisdictional Statement.

## STATEMENT OF THE CASE

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This is a direct appeal from a decision of the Indiana Supreme Court holding the Statute of Limitations provisions of Indiana's Workmen's Occupational Diseases Act (hereinafter referred to as the Act) constitutional. Appellant's Jurisdictional Statement raises issues of due process and equal protection before this Court.

Appellant was denied compensation benefits for alleged disability due to the inhalation of asbestos fibers because his claim was filed twenty-seven years after the expiration of the limitations of actions provisions of the Act. Appellant was employed by Appellee in February of 1949 and was last exposed to asbestos in the workplace in November of 1950. He continued in defendant's employ until March, 1966, when he left for better employment with Grain Processing Corporation of Muscatine, Iowa.

Appellant filed a claim for disability under Indiana's Occupational Diseases Act, Ind. Code § 22-3-7-1, *et seq.* (Burns 1974), on June 17, 1978 stating he had been diagnosed as suffering from asbestosis in July of 1976.

Appellant appeared before a Hearing Member of the Industrial Board of Indiana on October 2, 1980. Appellant testified at the time of the hearing to the facts set out above and stated that he was then still employed by Grain Processing. Appellant's claim was dismissed for the reason that his claimed disability had not arisen within three (3) years of the date of last exposure as required by the time limitations provisions of the Act. Ind. Code § 22-3-7-9(f). That decision was adopted by the full Industrial Board of Indiana.

The Indiana Court of Appeals found the statute of limitations provision unconstitutional by a two to one majority and reversed the Industrial Board. Appellee was granted a Petition to Transfer to the Indiana Supreme Court, which found the Court of Appeals in error, vacated their opinion, and affirmed the Industrial Board's dismissal of appellant's claim. Appellant has now filed a Jurisdictional Statement in the Supreme Court of the United States challenging the constitutionality of Indiana's Act under the due process and equal protection provisions of the Constitution of the United States.

The statute of limitations provisions of the Act generally provide that disability must occur within two (2) years after the last exposure to the hazards of the disease which caused the claimant's disability. In the case of diseases "caused by the inhalation of silica dust or asbestos dust" this period is extended to three (3) years. Ind. Code § 22-3-7-9(f) (Burns 1974).

Compensation is further conditioned on the requirement that an action for compensation must be brought within two (2) years of the date of disability. The relevant section also included a "tolling provision" which tolls the statute for mental incompetents or minor dependents without guardians or trustees. Ind. Code § 22-3-7-32(c) (Burns 1974).

In combination, the provisions cited afforded the appellant a maximum of five years, unless extended by the tolling provision, in which to bring an action for disability for asbestosis following his last exposure in 1950. Appellant argues that these limitations of actions provisions abridge his Constitutional rights of due process and equal protection in barring the claim he filed with the Industrial Board more than twenty-seven years subsequent to his last exposure to asbestos.

## SUMMARY OF ARGUMENT

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Appellee moves this Court to dismiss this appeal for the reason that it fails to raise a substantial Federal question. Under prior decisions of this Court statutes of limitations have been upheld despite challenges based on equal protection and due process. This action does not differ from those of prior cases and the issues presented here are, therefore, foreclosed by those cases.

Appellee also urges dismissal on the basis that the Federal question sought to be reviewed is not properly raised inasmuch as appellant lacks the disability which would entitle him to compensation even if he were not time-barred by the statute of limitations. Accordingly the "case or controversy" requirement is not met, in that appellant lacks standing.

In the alternative, appellee moves the Court to affirm the judgment sought to be reviewed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Statutes of limitation do not violate due process requirements of the Constitution if the time provided for bringing an action is reasonable. In this case the provisions of Indiana's Workmen's Compensation Act meet the test of reasonableness. Indiana's Act does not violate the equal protection provisions of the Constitution. In cases which do not involve a fundamental right or suspect classification the challenged statute meets the test of constitutionality as long as there is a reasonable basis for any classifications made by the Act. The classifications made by Indiana's Act meet this test of constitutionality.

## ARGUMENT

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### I. MOTION TO DISMISS.

#### A. Appellee Moves The Court To Dismiss This Appeal For The Reason That It Does Not Present A Substantial Federal Question.

Appellant challenges the statute of limitations provisions of Indiana's Act on equal protection and due process grounds. These constitutional questions are not substantial and appellant's action should be dismissed. See, e.g., *Martin v. Walton*, 368 U.S. 25 (1961); *Zucht v. King*, 260 U.S. 174 at 176 (1922); *Steinhardt v. Johns-Manville Corp.*, 78 A.D.2d 577, *aff'd*, 55 N.Y.2d 1008, 430 N.E.2d 1297, 445 N.Y.S.2d 244, amended 55 N.Y.2d 802, 432 N.E.2d 139, 447 N.Y.S.2d 437 (1981), *cert. denied and appeal dismissed, sub nom. Rosenberg v. Johns-Manville Sales Corp.*, ..... U.S. ...., 102 S.Ct. 2226, (1982); *Anderson v. Wagner*, 79 Ill.2d 295, 402 N.E.2d 560 (1979), *appeal dismissed sub nom. Woodward v. Burnham City Hospital*, 449 U.S. 807 (1980); *Thompson v. Thompson*, 285 Md. 488, 404 A.2d 269, *appeal dismissed*, 444 U.S. 1062 (1979). Appellant in a single sentence in his jurisdictional statement argues without citation of authority that a substantial Federal question is raised because the limitation period as applied in this case deprived appellant of a remedy before his right had accrued.

It has long been settled that the mere assertion of a Federal question will not suffice to provide jurisdiction. The existence of a real and substantive issue is essential to avoid a motion to dismiss. These principles have long been established and were discussed in *Equitable Life Assurance Society v. Brown*, 137 U.S. 308 (1902). That case came before this Court on a writ of error to review a

decision of the Supreme Court of the territory of Hawaii affirming a trial court judgment for plaintiff on a life insurance policy. Appellant had raised the due faith and credit clause of the constitution in defense of the action at trial. The evidence on that issue had been rejected by the trial court, and the Hawaii Supreme Court affirmed finding the issue was without merit. In granting dismissal this opinion of the Court said:

[T]he doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this Court as to leave no room for real controversy, the motion to dismiss will prevail.

187 U.S. at 311.

This Court also dismissed an appeal raising constitutional questions in *Deming v. Carlisle Packing Company*, 226 U.S. 102 (1912) where Justice White said:

In view, however of the well-settled and, indeed, now elementary doctrine that although a record may present in form a Federal question, a motion to dismiss will be allowed where it plainly appears that the Federal question is of such an unsubstantial character as to cause it to be devoid of all merit, and therefore frivolous, we think it is our duty to grant a motion to dismiss which has been here made.

226 U.S. at 105.

These cases make it perfectly clear that dismissal is appropriate where the constitutional issues raised are devoid of merit and unsubstantial. The mere assertion of constitutional issue is not sufficient to confer jurisdiction.



As in *Deming* and *Equitable*, this appeal presents issues which are unsubstantial and without merit and it should be dismissed. The issues raised herein have been considered and resolved in prior actions which have upheld the validity of limitation of actions despite similar constitutional challenges. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982); *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Steinhardt v. Johns-Mansville Corp.*, 54 N.Y.2d 1008, 430 N.E.2d 1197 (1981), *amendment granted*, 55 N.Y.2d 802, 432 N.E.2d 139 (1981), *appeal dismissed*, ..... U.S. ...., 102 S. Ct. 2226 (1982); *Anderson v. Wagner*, 79 Ill. 2d 295, 402 N.E.2d 560 (1979), *appeal dismissed sub nom. Woodward v. Burnham City Hospital*, 449 U.S. 807 (1980). These cases foreclose the issues presented here and render further discussion of these issues unnecessary.

The favored status of statutes of limitations is evidenced by this Court's comments in *Wood v. Carpenter*, 101 U.S. 135, at 135 (1879):

Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.

In the more recent case of *Board of Regents v. Tomanio*, 446 U.S. 478, at 487 this Court stated:

On many prior occasions, we have emphasized the importance of the policy underlying state statutes of limitations. Statutes of limitations are not simply

technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system.

Thus in the judgment of both legislatures and courts, statutes of limitations prevent the litigation of fraudulent or stale claims and permit settled expectations. In accomplishing these goals certain meritorious claims may be barred without violation of the constitutional right to due process and equal protection.

Nevertheless, appellant urges the Court to consider this particular appeal and argues that it presents a substantial Federal question because his claim was barred before it actually accrued. In fact, appellant had no viable claim. (See Section I.B. of this brief.) Nevertheless, his argument does not raise the issue in this appeal to the status of a substantial Federal question. Commenting on this very issue of unavoidable delay this Court in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), at 314 stated:

Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the Courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of R. Telegraphers v. Railway Exp. Agency*, 321 U.S. 342, 349, 99 L.ed. 788, 792, 64 S. Ct. 582. *They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay.* They have come into the law not through the judicial process but through legislation. They represent public policy about the privilege to litigate. (Footnote omitted; emphasis added).

This comment makes it clear that statutes of limitations will by design bar action even in cases such as appellant's where the delay is unavoidable because the injury is not yet discovered. That fact does not, as *Chase* suggests, render the statute unconstitutional.

In *Thompson v. Thompson*, 285 Md. 488, 404 A.2d 269, appeal dismissed, 444 U.S. 1062 (1979), this Court dismissed an appeal for want of a substantial Federal question despite the assertion of an issue of unavoidable delay similar to that which appellant raises in this case. In that matter a minor child challenged the constitutionality of a portion of Maryland's Code which required any action to establish paternity of an illegitimate child to be commenced during the pregnancy of the mother or two years after the birth of such child. The *Thompson* child was born on May 10, 1969, and on December 1, 1971, her mother filed a paternity action against the alleged father. The father answered and defended on the basis that the action was barred by the applicable statute of limitations. The minor challenged the constitutionality of the statute raising due process and equal protection arguments.

With respect to the due process issue the minor advanced precisely the same argument espoused by the appellant herein. The minor argued that the two year statute of limitations would extinguish her remedy before she had any real opportunity to assert it. She argued that although her mother was permitted to institute a paternity proceeding in her behalf she might have a continuing fondness for the father, a reluctance to publicly reveal her indiscretion or other reasons which would militate against her bringing an action. In rejecting the due process argument made by the minor the Maryland Court of Appeals quoted with approval from the lower court as follows:

Certainly, we feel that it is reasonable for the legislature to conclude that this policy decision, when coupled with the State's legitimate interest in preventing stale or fraudulent claims, on balance, outweighs the potential harm to illegitimate children who may have their right to paternal support forfeited by the mother's inaction.

404 A.2d at 273.

Following the decision of the Maryland Court the minor appealed to the United States Supreme Court and that appeal was dismissed for want of substantial Federal question. 444 U.S. 1062.

*Thompson v. Thompson* is further persuasive authority that appellant's due process and equal protection challenges to Indiana's statute of limitations are foreclosed by prior cases. It stands as additional authority for the proposition that the legislature is entitled to exercise its judgment in establishing periods of limitations as long as they are reasonable. The mere fact that a remedy may be extinguished by a statute of limitations before a cause of action accrues does not render the statute of limitations unconstitutional. As evidenced by the *Thompson* case the states have a legitimate interest in preventing stale and unjust claims.

*Steinhardt v. Johns-Manville Corp.*, 78 A.D.2d 577, *appeal dismissed, cert. denied*, .... U.S. ...., 102 S. Ct. 2226 (1982), involved a fact situation identical to the instant action and discussed those issues raised by the appellant herein. The *Steinhardt* case consolidated several plaintiffs' actions. Each of the plaintiffs asserted injuries caused by the inhalation of asbestos particles, and all plaintiffs had commenced negligence actions more than four (4) years after their last employment-related exposure to asbestos.

The defendants were granted summary judgment which gave rise to appeals ultimately terminating in the United States Supreme Court. In an effort to avoid the statute of limitations defense the plaintiffs/appellants urged the Court to adopt the position that the statute of limitations period should run from the date on which the defense was or could have been discovered. Under New York law, as in the Indiana statute, the statutory period began to run from the date of plaintiffs' last exposure to asbestos. The New York Court of Appeals refused to adopt that position and affirmed the motion for summary judgment. On motion by the plaintiffs the Court of Appeals of New York granted remittitur and amended its findings to hold that the United States constitutional issue of due process had been presented and was necessarily passed on. Appeal to this Court followed. In a memorandum decision on May 17, 1982, this Court dismissed the appeal for want of jurisdiction and, treating the papers presented as a petition for certiorari, denied the petition.

As in the instant action, the appellants in *Steinhardt v. Johns-Manville* took the position that the statute of limitations which began to run from the date of last exposure deprived them of due process of law. The argument advanced in *Steinhardt* is the same as that espoused by the appellant herein. *Steinhardt, et al.*, argued that the statutory period barred an action before plaintiffs learned that they had sustained injuries as a result of their asbestos exposure. Despite those arguments this Court denied certiorari.

The *Steinhardt* decision is further authority that the appellant fails to present a substantial Federal question. The issues presented by this appeal have been considered by this Court in prior cases and are foreclosed by these

decisions which are consistent with the holding of the Indiana Supreme Court in this action. *Deming v. Carlisle Packing Co.*, 226 U.S. 102 (1912).

*Anderson v. Wagner*, 79 Ill. 2d 295, 402 N.E.2d 560 (1979), appeal dismissed, sub nom. *Woodward v. Burnham City Hospital*, 449 U.S. 807 (1980), also provides additional authority that the issues raised by this appeal fail to present a substantial Federal question. In *Anderson* the Illinois Supreme Court affirmed a decision upholding the constitutionality of a special limitation period for medical malpractice actions against physicians and hospitals. The act at issue provided a two year period for bringing medical malpractice actions based on tort or contract. The two year period began to run after the date on which the claimant knew or should have known of the existence of the injury or death for which damages are sought. The statute further provided that no action should be brought more than four years after the date on which the act or omission complained of occurred.

The plaintiffs in this consolidated appeal contended that the statute of limitations at issue violated the due process and equal protection clauses of the Federal constitution. Plaintiffs argued that a cause of action might be barred by the four year maximum time limit before a person learned of his injury. The Illinois Supreme Court upheld the statute commenting that while the result may seem harsh the reasonableness of the statute must be judged in light of the circumstances confronting the legislature and the end which it sought to accomplish.

The argument raised by the appellant in *Anderson v. Wagner* is precisely the same as that advanced by the appellant herein. This Court dismissed *Anderson* for want of a substantial Federal question.



In support of his jurisdictional statement, appellant contends that the findings of the Supreme Court of the State of Indiana are in conflict with rulings by the Supreme Courts of other states. In support of his contention, he cites three cases: *Diamond v. E.R. Squibb & Sons, Inc.*, .... Fla. ...., 397 So.2d 671 (1981); *Lankford v. Sullivan*, .... Ala. ...., 416 So.2d 996 (1982); *Pepsi Cola Bottling Company v. Long*, .... Miss. ...., 362 So.2d 182 (1978).

In *Diamond*, the Supreme Court of Florida struck down Florida's products liability limitations as it applied to a manufacturer of diethylstilbestrol (DES). The specific holding in the case was that the statute violated Article I, §21, of the Florida Constitution, which guarantees access to Florida's courts. *Diamond* is clearly decided solely upon state grounds and no mention of due process or Federal constitutional questions appears in the case.

*Lankford* is similar in that it strikes down an Alabama products liability statute of limitations as violative of §13 of the Alabama constitution, a general prohibition against arbitrary and capricious governmental action. Again, no mention is made of a Federal constitutional question and the case appears to have been decided entirely upon State constitutional grounds.

In *Pepsi Cola Bottling Company of Tupelow, Inc. v. Long*, *supra*, the Mississippi Supreme Court interpreted the statute of limitations provision of Mississippi's workmen's compensation laws as not barring plaintiff's claim. The statute of limitations in *Pepsi Cola* was not struck down, but rather interpreted consistent with State precedents to include a discovery provision for latent compensable injuries. This case makes no mention of constitutional law, either State or Federal, but simply interprets Mississippi's workmen's compensation statute.

Even if appellant is correct and could properly demonstrate that states differ regarding similar statutory provisions, exercise of Supreme Court jurisdiction would not be required. Appeals have often been dismissed for lack of a substantial Federal question even though different states have come to opposite conclusions regarding similar state statutes. *Thomas v. New York*, 444 U.S. 891 (1979); *Hill v. Garner*, 434 U.S. 989 (1977).

**B. Appellee Moves To Dismiss The Appeal For The Reason That Appellant Lacks The Standing Necessary To Fulfill the Case Or Controversy Requirement Of Article III.**

Appellant lacks standing to challenge Indiana's Act because at the time of the hearing before the Industrial Board he was not disabled and under the terms of the Act was not entitled to compensation. Appendix A to Appellant's Jurisdictional Statement, p. 18a; see, e.g., *Flast v. Cohen*, 392 U.S. 83 (1942); *Data Processing Service v. Camp*, 397 U.S. 150 (1969); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). As this Court has held:

Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions. . . . [C]oncrete injury removes from the realm of speculation whether there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.

*Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 221 (1974).

As Justice Hunter stated in his dissent in this case:

The non-constitutional grounds upon which this court should have disposed of this case are readily apparent in the record; there, it is revealed that claimant Bunker was not "disabled" at the time of the



hearing and therefore was not eligible for benefits under the Occupational Disease Act.

Appendix A to Appellant's Jurisdictional Statement, at p. 18a.

Justice Hunter's dissent recounts in its entirety the cross-examination of appellant which established his lack of disability at the time of his hearing. Appendix A, at p. 19a.

To meet the case or controversy requirement, a plaintiff seeking to challenge a statute must allege, "specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention." *Warth v. Seldin*, 422 U.S. 490, 508 (1975). "When a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Article III limitation." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976). As Justice Hunter notes, appellant in this case has not shown an injury to himself that is likely to be redressed by a favorable decision. Lacking the personal stake in the outcome which is requisite to standing, appellant's pleading in this Court should be dismissed.

## II. MOTION TO AFFIRM

### A. Indiana's Occupational Disease Act Does Not Violate The Due Process Provisions Of The U.S. Constitution.

Appellant argues that the time within which an action for disablement must be brought is too short and thus

violates due process. It has long been settled law that statutes of limitation do not violate due process as long as there is a reasonable time provided for the bringing of an action. *Ochoa v. Hernandez y Morales*, 230 U.S. 139 (1913); *United States v. F. & G. Co. v. U.S. Use of S.W. Co.*, 209 U.S. 306 (1908). The Legislature has the sole duty and responsibility to determine what constitutes a reasonable period unless the time allowed is so manifestly insufficient that it becomes a denial of justice. *Wilson v. Iseminger*, 185 U.S. 55 (1902); *Antoni v. Greenhow*, 107 U.S. 769 (1883).

In the construction of its workmen's compensation laws, the Indiana Legislature has attempted to provide a remedy which balances the interests of society in compensating persons who may have job-related diseases and the need to protect defendants from stale or fraudulent claims. Recognizing the longer latency period of lung-related occupational diseases, the legislature has extended from the normal two years to three years the period during which disability must arise. A claimant then has an additional two years from the date of disability in which to bring his claim, unless further extended by the tolling provisions.

It should be apparent that this five year period from date of last exposure until a claimant is time-barred is a reasonable time and not so manifestly insufficient as to constitute a denial of due process. Appellant's attempt to require the Courts to consider, and his former employer to defend, a claim which lapsed in 1955 illustrates the basic reasons for statutes of repose. Accordingly, even if a substantial federal question is deemed to exist, the judgment of the court below should nevertheless be affirmed.

The standard of review to be applied where statutes of limitations are challenged on due process grounds was

set out in *Terry v. Anderson*, 95 U.S. 628 (1877), where Chief Justice Waite stated:

This Court has often decided that statutes of limitations affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. . . .

In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of government unless a palpable error has been committed.

95 U.S. at 632-633.

The *Terry v. Anderson* decision makes it clear that this Court will defer to the judgment of the legislature where periods of limitation provided a reasonable time for actions to be brought. Appellant, therefore, bears a heavy burden to show that the five year period provided by Indiana's Occupational Disease Act is unreasonable. *Toombs v. Citizen's Bank of Waynesboro*, 281 U.S. 643 (1930). Plaintiffs only argument in that regard is that the limitations period may in some cases bar actions before potential plaintiffs are aware of their injuries. This fact does not make the period provided by the Indiana legislature unreasonable as evidenced by the above discussion of *Steinhardt v. Johns-Manville*, *Thompson v. Thompson*, and *Anderson v. Wagner*. See also *Texaco Inc. v. Short*, 454 U.S. 516 (1982).

The provisions of Ind. Code § 22-3-7-9(f) which grant special treatment to workers exposed to silica dust or asbestos dust, show that the legislature recognized that the latency period associated with this particular disease might be longer than other diseases. Moreover, the In-

diana Legislature has amended the Act on twenty-four separate occasions since 1937.<sup>1</sup> This legislative history shows a continuing interest by the Legislature in all aspects of the Occupational Disease Act, including the statute of limitation provisions. By the Acts of 1955, ch. 195, § 1, a one (1) year period of limitation was increased to two (2) years in subsection (f) and (g) of Ind. Code 22-3-7-9. By the Acts of 1961, a proviso relating to "occupational disease caused by exposure to radiation" was added to Ind. Code 22-3-7-9(f). By the Acts of 1974, p. 1, 109, sec. 3, "coal dust" was included with silica dust and asbestos dust permitting a claim within three (3) years of last exposure. Ind. Code 22-3-7-9(f). Thus, the Legislature has had ample opportunity to reconsider its three (3) year period of limitation and provide a longer period if it chose to do so. Numerous medical articles and studies have been published since the passage of the Occupational Disease Act and were available for consideration by the Legislature at the time of the many amendments to the Act.<sup>2</sup>

<sup>1</sup> The Act was passed and enacted into law as found in Acts 1937, ch. 69, § 1 *et seq.* Amendments were made as follows: Acts 1943, ch. 115, § 1, 2; Acts 1943, ch. 248, § 1; Acts 1945, ch. 290 § 1, 2; Acts 1947, ch. 164, § 1-8; Acts 1949, ch. 242, § 1-3; Acts 1951, ch. 250, § 1-3; Acts 1953, ch. 174, § 1; Acts 1955, ch. 131, § 1; Acts 1955, ch. 195, § 1, 2; Acts 1955, ch. 241, § 1; Acts 1955, ch. 276, § 1; Acts 1955, ch. 326, § 1; Acts 1957, ch. 353, § 1-3; Acts 1959, ch. 266, § 1; Acts 1959, ch. 359, § 1; Acts 1961, ch. 240, § 1; Acts 1961, ch. 312, § 1; Acts 1963, ch. 48, § 206, § 1, 2; Acts 1967, ch. 313, § 1, 2; Acts 1969, ch. 101, § 1-5; Acts 1971, P.L. 354, Sec. 1-3; Acts 1974, P.L. 109, Sec. 1-8; Acts 1975, P.L. 235, Sec. 5; Acts 1976, P.L. 122, Sec. 4-6; Acts 1977, P.L. 261, Sec. 4-6; Acts 1978, P.L. 2, Sec. 2212-2214; Acts 1979, P.L. 17, Sec. 34; Acts 1979, P.L. 227, Sec. 5, 6; Acts 1979, P.L. 228, Sec. 2; Acts 1981, P.L. 11, Sec. 126.

<sup>2</sup> Among these, see Dreeseen, *A Study of Asbestosis in the Asbestos Textile Industry*, Pub. Health Bull. No. 241, August,

(Footnote continued on following page)

Accordingly, compensation is granted for asbestos-related disability which arises within three years of last exposure instead of the two year period granted for other diseases. The plaintiff simply argues that this is not enough time and asks this Court to change the time period. It is not the role of this Court to substitute its judgment for that of the legislature by further increasing the statutory period provided in the Act. *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Smith v. Government of Virgin Islands*, 329 F.2d 135, *appealed* 361 F.2d 469, *cert. denied sub nom. Smith v. Virgin Islands*, 377 U.S. 979, *reh. denied* 379 U.S. 872 (1964). The appropriate forum for any such change is the Indiana legislature and not this Court.

**B. Indiana's Occupational Disease Act Does Not Violate The Equal Protection Provisions Of The U.S. Constitution.**

Appellant also challenges the statute of limitation on equal protection grounds. "In the absence of a classification that is inherently invidious or that impinges upon fundamental rights, a state statute is to be upheld against equal protection attack if it is rationally related to the achievement of legitimate governmental ends." *G.D.*

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<sup>2</sup> *continued*

1938; Holleb and Angrist, *Bronchogenic Carcinoma in Association with Pulmonary Asbestosis*, 18 Am. J. Pathology 123 (1942); Isselbacher, Klaus and Hardy, *Asbestosis and Bronchogenic Carcinoma*, 15 Am. J. of Med. 721 (1953); Smith, *Survey of Some Current British and European Studies of Occupational Tumor Problems*, 5 AMA Arch. Indus. Hygiene 242, corrected 606 (1952); Doll, *Mortality from Lung Cancer in Asbestos Workers*, 12 Brit. J. Indus. Med. 81 (1955).

*Searle & Co. v. Cohn*, 455 U.S. 404, 102 S.Ct. at 1141. See also *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). This Court discussed the standard of review in equal protection cases in *Dandridge v. Williams*, 397 U.S. 471 (1970):

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369. "The problems of government are practical ones and may intensify, if they do not require, rough accommodations—illogical, it may be and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69, 70, 33 S.Ct. 441, 443, 57 L.Ed. 730. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393.

397 U.S., at 485. (Emphasis added).

As noted in *Dandridge*, classifications with some reasonable basis do not violate the Equal Protection Clause, even though inequity may result. Applying this reasonable basis test to other-than-suspect classifications, such as appellant's, the courts have consistently upheld statutes of limitations enacted to ensure that the courts and defendants are not required to litigate stale claims. *Mathews v. DeCastro*, 429 U.S. 181 (1976); *Clark v. Gulesian*, 429 F.2d 405 (1st Cir. 1970), cert. denied, 400 U.S. 993 (1971); *Pittman v. U.S.*, 341 F.2d 739 (9th Cir. 1965), cert. denied, 382 U.S. 941 (1965).

Appellant has argued that Indiana's Occupational Disease Act creates classifications which violate equal



protection by treating workers exposed to asbestos differently from those exposed to radiation. Appellant also argues that the Act creates a prohibited classification by treating differently those whose disability arises more than 3 years after their last exposure from those continuously exposed. The appellant provides no support for his argument that workers suffering from asbestos and radiation should be treated similarly. The appellant carries a heavy burden to prove the actions of Indiana's legislature in providing different limitations periods for asbestos and radiation exposure did not have a reasonable basis. *Toombs v. Citizen's Bank of Waynesboro*, 281 U.S. 643 (1930).

At no point from the start of this case before the Industrial Board to this date has appellant offered any facts to show that the period of latency for radiation exposure is the same as that for asbestos or that the diseases are in any way similar. The legislature undoubtedly had the benefit of hearings, debates, medical testimony and staff research when drafting Indiana's Workmen's Occupational Diseases Act and when setting the specific limitation periods provided for asbestos and radiation. Even if it is assumed that these diseases have similar latency periods, that fact does not meet appellant's burden to show that the legislative classifications are in violation of equal protection. These classifications enjoy a presumption of constitutionality, *Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151 (1931), which has not been overcome by appellant. The appellant asks this Court to find the period of limitation unconstitutional without the benefit of any record or challenge to support the claim of improper classification.

**CONCLUSION**

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For all the foregoing reasons, the appellee moves this Court to dismiss this appeal or in the alternative to affirm the judgment of Indiana's Supreme Court.

Respectfully submitted,

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